Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-373

In The
Supreme Court of the United States
October Term, 1985

CHARLES REED AND ROLAND DUTY,
Petitioners,

v.

JAMES TERRELL, SUE RAYBOLD, BILL LOGUE, JOE JOHNSON, AND THE STATE BAR OF TEXAS,
Respondents.

RESPONDENT SUE RAYBOLD'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

FREDERICK DEB. BOSTWICK III
LARRY O. BRADY
OF
NAMAN, HOWELL, SMITH & LEE, P.C.
Texas Center
P. O. Box 1470
Waco, Texas 76703
(817) 754-1421

Attorneys for Respondent Sue Raybold

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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REPLY TO QUESTIONS PRESENTED

The "questions presented" by petitioners are presented in a slanted, biased, and argumentative fashion, assume facts, misstate the law, and fail to present the actual factual foundation of this lawsuit, and therefore should not be considered by this Court.

Specifically, the statute in question, Family Code § 11.18(a), is not arbitrary, and does not apply only against men. Further, the claims raised in federal court *would be barred* in state court. Further, petitioners seek relief, declaratory or otherwise, not from enforcement of a statute, but from state court money judgments rendered in civil actions which were not appealed but which were allowed to become final and which are not void. Petitioners raised no constitutional issues in state court, but now ask the federal courts to relieve them of the obligations and effect of those judgments.

In addition, the "precedent" asserted by petitioners is not on point and is in no manner violated by, nor does it conflict with, the judgments of the district and circuit courts, which are fully supported by their own precedent.

For these reasons, as well as those discussed below, the "questions presented" do not present an issue appropriate for review by this Court.

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OPINION BELOW

The judgments and opinions in the courts below are attached as appendices to petitioners' petition.

STATEMENT OF THE CASE

The statement included in the petition contains material largely outside the record, slanted and argumenta-

tive presentation of the proceedings below, misstatements of the state law, facts assumed but not in evidence, sarcasm, and other improper material. The procedural outline, relieved of all the foregoing, is essentially correct.

REASONS FOR DENYING THE WRIT

I.

The Holdings Of The District Court And Court Of Appeals Are Based On A Long Standing Principle That The Federal Courts Are Not Courts Of Appeal With Powers Of Review Over State Court Judgments.

Petitioners' § 1983 claim is no more than an effort to attack collaterally, and achieve federal court review of, various final state court orders and judgments rendered in connection with domestic matters. It has been consistently held that this is impermissible, because federal courts do not sit in review of state court judgments. Petitioners' remedy, if they had a complaint with the state court judgments on grounds of unconstitutionality of the underlying statute, was to appeal through the Texas state courts and apply from there to this Court for writ of certiorari. Their remedy was not to file a separate federal suit seeking relief from those judgments. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed. 2d 206, 222-23 (1983); *Olivares v. Martin*, 555 F.2d 1192, 1195 (5th Cir. 1977); *Almon v. Sandlin*, 603 F.2d 503, 506 (5th Cir. 1979); *Sawyer v. Overton*, 595 F.2d 252 (5th Cir. 1979).

Petitioners have sought to disguise their efforts to achieve review of the final state court judgments by characterizing their suit as a § 1983 action for deprivation of civil rights. It has been consistently held that "a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." *Hagerty v. Succession of Clements,* 749 F.2d 217, 220 (5th Cir. 1984); *Sawyer v. Overton, supra,* 595 F.2d at 252.

Petitioners seek relief from the final state court judgments on the basis that the statute on which it was based is void. *Relief from final judgments is not available on this basis.*

Petitioners allowed the challenged judgments for attorney's fees to be rendered against them without raising a question as to the constitutionality of the underlying statute. They allowed those judgments to become final and, for the most part, to be enforced. Those judgments were not void. Even were Family Code § 11.18(a) to be held invalid in a subsequent ruling in another forum, this would have no effect on the binding nature of those judgments. There is no procedural or legal basis for this Court to review those judgments, and no basis for review of any issue petitioners seek to raise, as no determination concerning the constitutionality of the underlying statute can have any effect on the final state court judgments against petitioners.

The sole method for seeking review of and relief from a state court judgment is to appeal to the state court of last resort and from there seek a petition for writ of certiorari to this Court. 28 U.S.C. § 1257; *Hagerty v. Succession of Clements, supra,* 749 F.2d at 220: "To the extent

that there was any constitutional error in the [state] court's decision, sole recourse . . . was to the United States Supreme Court, not to federal district court."

Because this case is an effort to achieve federal court review of final and unappealed state court judgments, not properly, by application for writ of certiorari, but through a separate and collateral lawsuit, the lower courts were correct in dismissing this action, and there is no basis whatsoever for review of those courts' decisions by this Court.

II.

The District Court's Dismissal Is Consistent With Other Fifth Circuit Cases, Holdings Of The United States Supreme Court, And State Law.

Petitioners assert as a basis for review by this Court that the attack made in district court on the final state court judgments would not be precluded if asserted in state court and so is not precluded in federal court. They argue that (1) the state court judgments are void; (2) under state law may be collaterally attacked at any time; and (3) so may be collaterally attacked in federal court.

Petitioners' argument suffers from several infirmities.

A state court judgment may not be reviewed by a federal district court. Review of a judgment of a state court of last resort is possible only in the United States Supreme Court. *District of Columbia Court of Appeals v. Feldman, supra,* 460 U.S. at 482; 72 L.Ed. 2d at 222-23; *Almon v. Sandlin, supra,* 555 F.2d at 1196; *Razatos v. Colorado Supreme Court,* 746 F.2d 1429, 1432 (10th Cir. 1984).

However, petitioners have not sought review of the decisions of the *highest* state court, but simply of state trial court judgments, which were not appealed and became final. Petitioners made no effort to appeal the state court judgments; however, they now seek relief from the federal courts liberating them from the effects of those judgments. Because petitioners did not take the steps available to them in the state courts to attack the judgment they may not complain in another forum of matters that should have been raised there.

Petitioners contend that under Texas law a "void" judgment can always be attacked at any point in any court, and that the district court's dismissal of their suit violates this policy. Petitioners are incorrect in their basic premise.

A judgment is based on a statute later declared to be unconstitutional is not rendered "void." *King v. King,* 291 S.W. 645 (Tex. Civ. App.—San Antonio 1927, writ dism'd). It is merely erroneous and is binding unless and until regularly set aside or reversed. *Commonwealth of Massachusetts v. Davis,* 140 Tex. 398, 168 S.W.2d 216, 220 (1942), cert. den., 320 U.S. 210. See Annotation: Validity and Effect of Judgment Based upon Erroneous View as to Constitutionality or Validity of a Statute or Ordinance Going to the Merits, 167 A.L.R. 517, 532. In *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940) this Court held that the existence of a statute which has been declared unconstitutional is an operative fact which cannot be ignored. The effect of its unconstitutionality cannot be determined simply by applying "retroactive invalidity." Petitioners

cite no authority for the proposition that such a judgment is void.

If a court has jurisdiction of parties and subject matter, the judgment is not void, no matter how erroneous it may be. *Martin v. Sheppard,* 145 Tex. 639, 201 S.W.2d 810, 812 (1947). If a collateral attack is to be successful the record must affirmatively reveal a jurisdictional defect. *White v. White,* 142 Tex. 499, 179 S.W.2d 503, 506 (1944). There has been no suggestion that the state district courts had no jurisdiction.

Moreover, the Texas Supreme Court has recently held that an arguably "void" judgment must be attacked by appeal or bill of review, and has rejected the concept that a void judgment may be attacked in any manner at any time. *Middleton v. Murff,* 689 S.W.2d 212, 213 (Tex. 1985).

Under both Texas and federal law, the issue of the constitutionality of a statute can be waived if not raised in the lower court. *District of Columbia Court of Appeals v. Feldman, supra,* 460 U.S. at 482 n. 16, 75 L.Ed.2d at 223 n. 16; *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398, 400 (1969); *Almon v. Sandlin, supra,* 603 F.2d at 506. *Babcock v. State,* 668 S.W.2d 857, 861 n. 4 (Tex. App.—Austin 1984, writ ref'd n.r.e.); *Jackson v. Leonard,* 578 S.W.2d 879, 882 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). Petitioners seek review and expunction of the judgments of the state district courts on grounds of unconstitutionality but did not raise that

ground at any point in the trial court or on direct appeal from those judgments. Even if this collateral proceeding attacking those judgments were permissible, which it is not, the issue of constitutionality has been waived.

Petitioners, citing as "precedent" *Migra v. Warren City School District Board of Education,* — U.S. —, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), argue that in federal court a state court judgment is to be given *only* that preclusive effect it would have in state court.

In this case, the original judgments rendered in state district court, and allowed to become final without appeal, would clearly have precluded a subsequent effort in state court to avoid the judgments. *Middleton v. Murff, supra,* 689 S.W.2d at 213; *King v. King, supra,* and the cases authorizing a waiver of the constitutionality issue by failure to raise this issue in the initial proceedings.

For these reasons this Court should decline to review this case.

III.

Federal Declaratory Relief Is Not Available To Protect An Individual From Enforcement Of A Final Judgment Rendered In State Court.

Petitioners contend that they are attacking the constitutionality of Family Code § 11.18(a). However, an analysis of their complaint and the arguments made in the Fifth Circuit and in this Court shows clearly that petitioners, though purporting to assert a § 1983 claim, in reality seek nothing more than relief from money judgments rendered in state district court in civil cases by

securing a ruling that such judgments are unconstitutional, hence null and void.

The authorities cited above establish that the federal courts do not sit as courts of appeal to review final state court judgments, particularly those in civil cases from which no appeal was taken to a higher state court. See also, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Petitioners cite no cases as authority for their argument that federal declaratory relief is available in a case such as this.

The alleged "constitutional" claims presented by petitioners were "inextricably intertwined" with the state court's judgments. "[T]herefore the district court could not have properly reviewed the state court decision." *Hagerty v. Succession of Sawyer, supra,* 749 F.2d at 220.

Further, petitioners do not now face enforcement of an allegedly void statute, but of valid final judgments rendered by state district courts whose jurisdiction has not been questioned, and in which the constitutionality of the statute was not challenged. Even a holding at this point that Family Code § 11.18(a) is unconstitutional would not operate retroactively to invalidate final state court judgments based on that legislation. *Commonwealth v. Davis, supra,* 168 S.W.2d at 220.

As a result petitioners were not entitled to prospective declaratory relief in the district and circuit courts, which could only have taken the form of an order holding the judgments to be null and void. As shown above, the final and unappealed state court civil judgments for money damages are not void, and cannot be expunged by declaratory or other relief by the federal courts.

IV.

The Lower Courts Ruling On Petitioners' Claims Against The State Bar Of Texas Was Correct.

The circuit court did not rule that petitioners' claim against the State Bar of Texas was "not actionable under 42 U.S.C. §§ 1983 and 1985." It ruled correctly that this claim, seeking to assert an antitrust violation, has no merit.

Petitioners have not alleged or shown that they were damaged, or their civil rights were violated, by any action of the State Bar of Texas. There is no suggestion that either of the respondents who secured judgments for attorney's fees against petitioners attended any State Bar seminar or was influenced by State Bar activity. Petitioners have failed to allege or demonstrate causation and as a result, in addition to all the other reasons discussed above, their claims have no merit.

V.

The Court Should Award Attorney's Fees To Respondent Because Petitioners' Claims Are Frivolous.

Under Rule 49(b) this Court has authority to award damages to a respondent when a petition for writ of certiorari is frivolous. A proceeding is frivolous when it involves legal points not arguable on their merits. *Hagerty v. Succession of Clements, supra,* 749 F.2d at 222.

The rules of law controlling disposition of this case are well-settled and supported by precedent in this Court as well as the Fifth Circuit and state courts. Petitioners have cited no authority on point, no cases establishing a

legitimate conflict with the relevant decision, and no basis for a finding of a departure from accepted judicial standards—in short, no grounds for the granting of their application.

The history of this proceeding has been one of harassment of respondents, frivolous claims, and continued efforts by petitioners to avoid their legitimate obligations. They have ignored the procedures available to them to seek relief from judgments with which they are unhappy, have disregarded precedent that clearly demonstrates the impropriety of this proceeding, have been reprimanded by the Fifth Circuit on oral argument, and still have persisted in filing an Application in this Court.

As a result, as in the very similar case of *Hagerty v. Succession of Clements, supra,* this Court should award respondent compensation in the form of a reasonable attorney's fee incurred in responding to the petition.

—o—

CONCLUSION

For the reasons discussed above the Court should refuse to grant a writ of certiorari in this case.

Respectfully submitted,

FREDERICK DEB. BOSTWICK III
LARRY O. BRADY
OF
NAMAN, HOWELL, SMITH & LEE, P.C.
Texas Center
P. O. Box 1470
Waco, Texas 76703
(817) 754-1421

Attorneys for Respondent
Sue Raybold